Bank Bumiputra Malaysia Bhd v Emas Bestari Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02–2890 OF 2010 AND CIVIL APPEAL W-02–2886 OF 2010
ABDUL WAHAB PATAIL, BALIA YUSOF AND TENGKU MAIMUN JJCA
3 OCTOBER 2013

Tort — Negligence — Banks — Appeal against decision of High Court — Term loan facility agreement — Cheques released — Money taken out three days later — Whether bank released cheque for loan to wrong individual — Whether bank had wrongly opened account — Whether company had knowledge and had given authority to opening of bank account — Whether High Court judge correct in decision

Mayban Finance Bhd ('MFB') had provided a loan of RM500,000 to Emas Bestari Sdn Bhd ('Bestari') under a term loan facility agreement and the agreement was guaranteed by its directors ('the guarantors') while the cheques were released by one Zauwiah into an account in Bumiputra Malaysia Bhd ('BBMB') under the name of Bestari. The money was taken out of the three days later but Bestari and the guarantors claimed that MFB had wrongly released the cheque for the loan to Zauwiah; and that BBMB had wrongly opened the account for Bestari as it was without their authority and knowledge and wrongly allowed the company to be taken out by Zauwiah. Bestari then commenced proceedings in the High Court against MFB, BBMB and Zauwiah under the tort of negligence on the part of MFB and BBMB. Earlier, an action was commenced by MFB against Bestari and its guarantors and this suit was consolidated with the action commenced by Bestari. Judgment in default was entered against Zauwiah while the suit by MFB was dismissed on the ground that MFB failed to prove the amount outstanding. The High Court held both MFB and BBMB to be negligent. MFB was negligent in handing over the cheque to Zauwiah while BBMB was also negligent in opening the account in the name of Bestari and allowing the cheque issued by MFB in the name of Bestari to be banked in and later cash taken out by Zauwiah. Hence, the present appeal.

Held, allowing the appeal with costs:

(1) The term loan facility agreement by virtue of cl 6 provided that 'The lender reserves the absolute right to waive any of the conditions precedent set out in this section'. The judge had failed to address her mind correctly. Had she done so, she would not have merely accepted the

objection and come to the conclusion she had made to disallow the submission of waiver, because it was purely a question of law whether the beneficiary of a provision might forgo it (see paras 28–29).

(2) The judge failed to take into consideration that it was pleaded that Zauwiah was, at all times, a shareholder of Bestari and acted to assist Bestari to obtain approval for a loan of RM500,000. Had the judge considered the evidences before the court, she could not have come to the conclusion that Bestari had proved its case under the tort of negligence against MFB on the basis that handing over the cheque to Zauwiah constituted an act of negligence in the tort of negligence. MFB had at all times dealt with Zauwiah as the representative of Bestari and the directors were content that it be so, and their reaction on discovery of alleged misconduct was to sweep the purported misconduct under the carpet and allow her to take over the company (see paras 31–32).

(3) Too much weight was put on the failure to verify even with the imperfections in the signatures, and not enough weight was given to the fact and evidence before the Court that it was pleaded that Zauwiah was appointed to represent Bestari. If all these were taken into consideration and given the proper weight, it showed that in all the circumstances, Bestari was the author of its own misfortune, and even if it were not wholly responsible, it had effectively accepted the conduct of Zauwiah. Its failure to act promptly upon purported discovery in all probability made impossible and therefore denied opportunity to both MFB and BBMB to minimise losses. A party could not approbate and reprobate, and still seek recovery for itself, as was the case here when Bestari and its guarantors proceed to sue MFB and BBMB in 1998 (see paras 40–41).

[Bahasa Malaysia summary

Mayban Finance Bhd ('MFB') telah memperuntukkan kemudahan sebanyak RM500,000 kepada Emas Bestari Sdn Bhd ('Bestari') di bawah perjanjian kemudahan pinjaman jangka masa dan perjanjian tersebut telah dijamin oleh pengarah-pengarahnya ('penjamin-penjamin') sementara cek-cek dikeluarkan oleh Zauwiah ke dalam akaun di Bumiputra Malaysia Bhd ('BBMB') di bawah nama Bestari. Wang tersebut telah dikeluarkan tiga hari kemudian tetapi Bestari dan penjamin-penjaminnya mendakwa bahawa MFB telah mengeluarkan cek dengan salah untuk kemudahan tersebut kepada Zauwiah; dan bahawa BBMB dengan salah telah membuka akaun untuk Bestari memandangkan ia telah dilakukan tanpa kebenaran dan pengetahuan mereka dan dengan salah telah membenarkan wang tersebut dikeluarkan oleh Zauwiah. Bestari kemudian memulakan prosiding-prosiding di Mahkamah Tinggi terhadap MFB, BBMB dan Zauwiah di bawah tort kecuaian bagi pihak MFB dan BBMB. Sebelumnya, tindakan telah dimulakan oleh MFB terhadap Bestari dan penjamin-penjaminnya dan guaman ini telah digabungkan dengan tindakan yang dimulakan oleh Bestari. Penghakiman ingkar telah dimasukkan

terhadap Zauwiah sementara guaman oleh MFB telah ditolak atas dasar MFB gagal untuk membuktikan jumlah yang tertunggak. Mahkamah Tinggi memutuskan bahawa kedua-dua MFB dan BBMB adalah cuai. MFB cuai dengan menyerahkan cek kepada Zauwiah sementara BBMB juga telah cuai dengan membuka akaun atas nama Bestari dan membenarkan cek yang dikeluarkan oleh MFB atas nama Bestari untuk dibankkan dan wang tunainya kemudian dikeluarkan oleh Zauwiah. Justeru, rayuan ini.

Diputuskan, membenarkan rayuan dengan kos:

(1) Perjanjian kemudahan pinjaman jangka masa menurut klausa 6 memperuntukkan bahawa 'The lender reserves the absolute right to waive any of the conditions precedent set out in this section'. Hakim telah gagal untuk mengarahkan mindanya dengan betul. Sekiranya beliau melakukan sedemikian, dia tidak akan menerima bantahan tersebut dan membuat kesimpulan untuk tidak membenarkan hujahan pengenepian atas sebab semata-mata bahawa ia adalah persoalan undang-undang sama ada benefisiari peruntukan mungkin membenarkannya (lihat perenggan 28–29).

(2) Hakim gagal untuk mengambil kira bahawa adalah diplidkan bahawa Zauwiah, pada setiap masa matan, merupakan pemegang saham Bestari dan bertindak untuk membantu Bestari untuk mendapatkan kebenaran untuk kemudahan RM500,000. Sekiranya hakim telah mengambil kira keterangan-keterangan di hadapan mahkamah, beliau tidak akan membuat kesimpulan bahawa Bestari telah membuktikan kesnya di bawah tort kecuaian terhadap MFB atas dasar bahawa pemberian cek kepada Zauwiah membentuk tindakan kecuaian di dalam tort kecuaian. MFB telah pada setiap masa matan berurusan dengan Zauwiah sebagai wakil Bestari dan pengarah-pengarahnya juga tahu akan fakta tersebut, dan reaksi mereka terhadap salah laku yang didakwa adalah untuk mengendahkan salah laku tersebut dan membenarkannya dia mengambil alih syarikat (lihat perenggan 31–32).

(3) Terlalu banyak tumpuan dibuat ke atas kegagalan untuk mengenal pasti ketidaksempurnaan tandatangan-tandatangan, dan sedikit tumpuan telah diberikan kepada fakta dan keterangan di hadapan mahkamah bahawa telah diplidkan bahawa Zauwiah telah dilantik untuk mewakili Bestari. Sekiranya kesemua ini telah diambil kira dan diberikan pertimbangan yang sewajarnya, ia menunjukkan bahawa dalam semua keadaan, Bestari adalah penyebab nasib malangnya sendiri, dan meskipun ia tidak bertanggungjawab sepenuhnya, ia secara efektif menerima tindakan Zauwiah. Kegagalan untuk bertindak dengan segera setelah penemuan yang didakwa dalam segala kebarangkalian yang mustahil dan oleh demikian menafikan peluang kepada kedua-kedua MFB dan BBMB untuk mengurangkan kerugian. Suatu pihak tidak

boleh aprobat dan reprobat, dan masih menuntut semula untuk dirinya sendiri, seperti kes ini apabila Bestari dan penjamin-penjaminnya meneruskan untuk menyaman MFB dan BBMB pada tahun 1998 (lihat perenggan 40–41).] A

Notes B

For cases on banks, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1063–1065.

Cases referred to C

Donoghue (or McAlister) v Stevenson [1932] AC 562, HL (refd)

Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors [1994] 3 MLJ 185; [1994] 3 CLJ 567, SC (refd)

Legislation referred to D

Civil Law Act 1956 s 3(1)

Evidence Act 1950 s 90A(2)

Appeal from: Civil Suit No S-22–835 of 2010 (High Court, Kuala Lumpur) E
Civil Suit No S 2(6)–22–686 of 1998 (High Court, Kuala Lumpur)

Arham Rahimy bin Hariri (Azim, Tunku Farik & Wong) for the appellant in RS W-02–2890 of 2010 and for the fourth respondent in RS W-02–2886 of 2010.

Ram Karpal Singh (Sangeet Kaur Dev with him) (Karpal Singh & Co) for the first respondent in RS W-02–2890 of 2010 and in RS W-02–2886 of 2010. F

Eng Tiong Mei (Low Kok Hee with him) (Jal & Lim) for the appellant in W-02–2886 of 2010 and for the second respondent in W-02–2890 of 2010.

Abdul Wahab Patail JCA (delivering judgment of the court): G

[1] Civil Appeal W-02–2886 of 2010 is the appeal by Mayban Finance Bhd ('MFB') against the decisions of the High Court on 23 September 2010 to enter judgment of liability in Civil Suit S4(6)–22–686 of 1998 and apportionment of 40% liability against MFB. H

[2] Civil Appeal W-02–2890 of 2010 is the appeal by Bank Bumiputra Malaysia Bhd ('BBMB') against judgment and apportionment of 40% liability for damages to be assessed entered against it in the same Civil Suit S4(6)–22–686 of 1998. I

[3] The above Civil Appeals W-02–2886 of 2010 and W-02–2890 of 2010

A were heard together.

BACKGROUND

B **[4]** MFB provided a loan of RM500,000 to Emas Bestari Sdn Bhd ('Bestari') under a term loan facility agreement, with guarantees by its directors Ablah bin Othman and Hezlin Hezri bin Ablah ('the guarantors') and the cheques for which loan sum was released on 28 October 1995 to Zauwiah bt Dahlan ('Zauwiah').

C **[5]** The cheque for the loan sum was paid by Zauwiah into an account in BBMB under the name of Bestari. The money was taken out of the account three days later. Bestari and the guarantors say that:

D (a) MFB wrongly released the cheque for the loan to Zauwiah; and

(b) BBMB wrongly opened the account for Bestari as it was without their authority and knowledge, and wrongly allowed the money to be taken out by Zauwiah.

E **[6]** Bestari commenced proceedings in Kuala Lumpur Civil Suit S4(6)–22–686 of 1998 against MFB, BBMB and Zauwiah bt Dahlan (Zauwiah) under the tort of negligence on the part of MFB and BBMB.

F **[7]** An action was earlier commenced by MFB against Bestari, and its guarantors Ablah bin Othman and Hezlin Hezri bin Ablah under Shah Alam Civil Suit MT5–22–533 of 1997. That civil suit was transferred to Kuala Lumpur and registered as S-22–835 of 2010 and consolidated with the action commenced by Bestari.

G **[8]** Before trial, judgment in default was entered against Zauwiah. The civil suit by MFB was dismissed on the ground that MFB failed to prove the amount outstanding as at 11 August 1997 as claimed. There is no appeal by MFB against the dismissal.

H

THE HIGH COURT

I **[9]** In the High Court, Bestari sought the following orders against MFB, BBMB and Zauwiah bte Dahlan:

(a) Ganti rugi am termasuk teladan;

(b) Ganti rugi khas sebanyak RM1,032,494,60;

(c) Kos tindakan ini;

(d) Faedah terhadap keseluruhan amaun penghakiman disini pada taraf dan untuk jangka masa yang Mahkamah Mulia ini fikir patut dan sesuai; A

(e) Apa jua perintah dan/atau relif lain yang dianggap sesuai dan wajar oleh Mahkamah yang Mulia ini.

B

[10] The causes of action relied upon by Bestari was negligence in:

(a) MFB employing less than active banking procedures and failure to adhere to terms and conditions on the part of MFB in:

(i) failing to adhere to cll 3.03, 6.01 (b) and 6.01 (h) of the facility agreement of 28 October 1995; C

(ii) releasing the loan sum to Zauwiah bt Dahlan before Bestari supplied to MFB specimen signatures of those authorised to sign on behalf of Bestari.

D

(b) BBMB employing less than active banking procedures in:

(i) failing to verify the application to open the account 010013066091 on 24 October 1995;

(ii) its servants, En Zabidi Mohamed Akib and En Rusli Dollah, for whose acts it is vicariously liable, failing to verify that directors of Bestari had signed the forms to open the account before giving approval. E

[11] At the end of trial, the High Court ordered: F

(a) The claim by Bestari in Civil Suit S2(6)–22–686 of 1998 was allowed against MFB and BBMB with costs and damages to be assessed by the senior assistant registrar; and

(b) Liability and costs to be borne as follows: G

Bestari	20%
MFB	40%
BBMB	40%

H

[12] Bestari as plaintiff did not appeal. MFB and BBMB appealed.

[13] The core of the reasoning of the High Court was summed by the High Court as follows: I

> At the end of the trial I held that both MFB and BBMB were negligent. MFB was negligent in handing over the cheque to Zauwiah whilst BBMB was also negligent in opening the account in the name of EB and thereby allowing the cheque issued by

MFB in the name of EB to be banked in and later cash taken out by Zauwiah. However, I apportioned the liability, 40% to be borne by MFB and 40% to be borne by BBMB. The other 20% is to be borne by EB itself.

[14] The High Court found there was negligence as follows:

(a) MFB was negligent in handing over the cheque to Zauwiah; and

(b) BBMB was also negligent in opening the account in the name of EB.

[15] But, instead of giving its reasons why MFB was negligent in handing over the cheque to Zauwiah, the High Court added other basis for its finding of negligence:

> MFB granted the Term Loan Facility to EB and the Agreement is marked as Exhibit 'P-2'. Clause 6.01 (h) of the Agreement stipulates that 'the Borrower shall have furnished to the Lender specimen signatures of persons authorised to sign on behalf of the Borrower for the purpose of the Facility'. However there is evidence that there was non-compliance of the said Clause. Instead, DW1 tried to justify why it was so which would be irrelevant. The fact is that the condition precedent was not complied with. MFB also tried to say that it had waived this condition but this was not pleaded. Therefore it cannot be raised. Failure to obtain the specimen signatures enabled Zauwiah who was not given authority by EB to collect the cheque and deal with it.

FIRST PRINCIPLES

[16] So as not to be led astray by the everyday common notions of what constitutes 'carelessness', a synonym for 'negligence', it is necessary to bear in mind the cause of action is in the tort of negligence. A tort is a civil wrong. The law of torts encompasses a range of civil wrongs such as negligence, defamation, nuisance, trespass and passing off. It involves remedy where injury or damage is caused to another. The liability is imposed on a person who intentionally or negligently acts or fails to act in a particular manner. Although this implies that to be liable the person committing the tort, ie the tortfeasor, must be culpable, employers may be held liable for the acts of their employees under the principle of vicarious liability.

[17] The tort of negligence was established by the House of Lords in *Donoghue (or McAlister) v Stevenson* [1932] AC 562 (HL). Lord Atkins explained in *Donoghue v Stevenson* when the duty arises:

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, 'Who is my neighbour?' receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law

> is my neighbour? The answer seems to be: persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

[18] In the same case, Lord Macmillan had this to say:

> The law takes no cognizance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. In such circumstances carelessness assumes the legal quality of negligence and entails the consequences in law of negligence.

[19] The tort of negligence is not concerned with the ordinary notions of carelessness and for liability to arise there must be an assessment of the circumstances to determine whether a duty of care had arisen between the plaintiff and the defendant.

[20] An action under the tort of negligence involves establishing the following elements:

(a) A duty of care owed by the defendant to the plaintiff;

(b) A breach of that duty by the defendant;

(c) The breach caused the damage; and

(d) The damage is a foreseeable and not a too remote consequence.

[21] It should also be borne in mind that being part of the common law, the law of torts applicable in Malaysia is as provided by s 3(1) of the Civil Law Act 1956 (Revised 1972) Act 67.

[22] Bearing this in mind, we examine the grounds of judgment in the light of the appeals.

THE MFB APPEAL

[23] Bestari had relied upon cll 3.03, 6.01(g) and 6.01(h) of the term loan facility agreement dated 28 October 1995:

> 3.03 Procedures for Disbursement of the Facility
>
> The Facility shall be disbursed by the Lender to the Borrower or on behalf of the Borrower at the time and in the manner set out in the Letter of Offer dated 17 October 1995 after the execution and registration of this Agreement and upon the observance and performance by the Borrower of the covenants contained in

A Clause 6.01 hereof to be observed and performed by the Borrower.

6.01 Conditions Precedent

The following events are specified as conditions precedent to the disbursement of any part of the Facility. The obligation of the Lender to make any disbursement of the Facility is subject to the fulfilment, in the manner satisfactory to the Lender, prior to the making of any disbursement, of the following conditions:

(g) the Guarantee and all other security documents shall have been duly executed and stamped;

(h) the Borrower shall have furnished to the Lender specimen signatures of persons authorised to sign on behalf of the Borrower for the purpose of the Facility.

[24] These provisions are clearly included for the benefit of the lender, and must be satisfied by the borrower. Any protection it affords the borrower is incidental. But it remains that these are provisions that the lender may exempt the borrower from having to comply with. In other words, it may waive compliance with these conditions precedent.

[25] As the grounds of judgment extracted at para 15 above show, it was held the submission of waiver was not entertained because it had not been pleaded. The objection it had not been pleaded was accepted.

[26] The objection that a matter has not been pleaded is not the ground for the objection. It is a general description of the nature of the objection. But whether the objection is sustainable is decided by the grounds for the objection. Such grounds arise from the nature of the matter. Hence, if the matter raised is only a question of law, it need not be pleaded. Even if the matter is a question of fact, but the evidence relied upon in respect of it are already admitted in evidence before the court, which means the other party is not taken by surprise. Protestations or affectations of surprise 'because it was not pleaded' in such case holds no merit. Only if it is shown that the matter raised relied upon facts not pleaded and therefore the party making the objection did not have the opportunity of addressing the truth and accuracy of description of that fact, may the objection hold merit and be sustained. In *Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185; [1994] 3 CLJ 567 (SC), then Peh Swee Chin FCJ held:

> In the instant case, the defendants merely pleaded a denial of the acquisition of native customary rights claimed by the plaintiffs. This is not enough. They would have to say why; failure to do so would make any evidence of the reason for the denial objectionable at the option of the plaintiffs.

> The underlying well-known rationale for requiring such material facts to be pleaded is, of course, to prevent the opposing party from being taken by surprise by evidence which departs from pleaded material facts, for such evidence if allowed, will prejudice and embarrass or mislead the opposing party.
>
> If a party is taken by surprise, he must object then and there at the point of time when such evidence emerges, for such evidence to be disregarded by the court, and the court will then uphold such timely objection, The court will generally however grant an adjournment if requested, on suitable terms as to costs etc. for the pleading to be amended by the party seeking to adduce such evidence. One must bear in mind the need for an orderly adversary system of a court trial, not a chaotic harangue in a market.
>
> A party is not taken by surprise when the circumstances actually indicate so, e.g. when such evidence is the very evidence sought to be relied on by him from the outset, or when he fails to object to such evidence then and there as this court now seeks to emphasise.

[27] After elaborating on the point further, His Lordship concluded:

> Therefore a court inevitably ought to enquire, when there is failure to object to such evidence when it is adduced, whether it is such a radical departure, if not, it is a mere variation, modification or a development, then the impropriety of admission of such evidence at variance with the pleadings is deemed to be waived and the defect in such pleadings cured.

[28] In this case, the term loan facility agreement was before the court and cl 6 thereof provides: The lender reserves the absolute right to waive any of the conditions precedent set out in this section …

[29] The learned judge had failed to address her mind correctly. Had she done so, she would not have merely accepted the objection and come to the conclusion she had made to disallow the submission of waiver, because it is purely a question of law whether the beneficiary of a provision may forgo it.

[30] We dismiss the submission by counsel for MFB that exh D36 shows that Bestari had been paying the instalments payment for the facility since the disbursement on 28 October 1995. That document is a computer generated document and was not admissible for the reason it was not accompanied by a certificate under s 90A(2) of the Evidence Act 1950. That was the reason the claim by MFB was dismissed.

[31] The learned judge failed, on the evidence before the court,

(a) to take into consideration it was pleaded that Zauwiah was at all times a shareholder of Bestari and acted to assist Bestari to obtain approval for a loan of RM500,000;

(b) to consider while a purported share sale agreement was signed on 14 February 1996, there were two transfers of shares dated 10 October 1995 to Zauwiah of a total of 70,000 shares which would have made her, at the time the term loan facility agreement was entered into and cheque issued to Zauwiah, the majority shareholder of Bestari;

(c) to consider the authenticity of the purported share sale agreement dated 14 February 1996 when cl 3.01 iii provides that A third payment amounting to ringgit Malaysia Thirty Thousand (RM30,000) only shall be paid by the purchaser to the vendors on or before the 25 January 1996.

(d) to consider the testimony of PW1 Ablah bin Othman, director and first guarantor of Bestari where he admitted he was told by Zauwiah of payments made to service the loan at the end of 1995. In other words, he knew the loan had been disbursed, and he would obviously have known also at the time he had not complied with the conditions precedent in cl 6 of the term loan facility agreement. He made no issue of it then.

(e) to take into consideration that despite claiming to have discovered the misconduct of Zauwiah,

(i) PW1 and PW2 did not report to MFB, BBMB or police,

(ii) PW1 and PW2 instead entered into a share sale agreement with Zauwiah to take over Bestari;

(iii) Zauwiah was appointed director and listed as manager with effect from 11 January 1996; and

(iv) PW1 and PW2 Hezlin Hezri bin Ablah, the two guarantors remained as directors until the end of 1996.

[32] Had the learned judge considered these other evidence before the court, she could not have come to the conclusion that Bestari had proved its case under the tort of negligence against MFB on the basis that handing over the cheque to Zauwiah constituted an act of negligence in the tort of negligence. MFB had at all times dealt with Zauwiah as the representative of Bestari and the directors were content that it be so, and their reaction on discovery of alleged misconduct was to sweep the purported misconduct under the carpet and allow her to take over the company.

[33] We, therefore, allow the appeal by MFB and set aside the order of the High Court with costs.

THE BBMB APPEAL

[34] With regard to the finding against BBMB that it was also negligent in opening the account in the name of Bestari, the High Court held as follows:

(a) D2W1, an officer with BBMB, conceded that the signatures of the

Directors of (Bestari) in the resolution (exh P13) were obviously different from the signatures on p 109 of B2 and that he was suspicious of the authenticity of the signatures given by Zauwiah but still proceeded to open the account;

(b) D2W1 and D2W2 admitted that the application to open an account (exh P14) required the specimen signature of (Bestari) be furnished but yet both conceded the said requirement was not complied with;

(c) D2W2 admitted that he did not comply with certain term and condition of BBMB, particularly cl (b) p 109 which both witnesses conceded was designed to safeguard both the borrower and bank from instance of forgery;

(d) Both D2W1 and D2W2 were well aware that the address given by Zauwiah at p 109A, Bundle B2 was not that of (Bestari), but that of a tourist agency. Both of them also agreed, therefore, it was likely that the bank statements of BBMB would not reach (Bestari) as a result, yet they approved Zauwiah's application to open the said account using the said address.

In fact it was virtually admissions by both D2W1 and D2W2 that they had ignored or failed to carry out what were directions to safeguard the P and the D2 itself.

…

Since an account was to be opened and later on opened in (Bestari's) name with BBMB, albeit by Zauwiah using forged documents, the bank owed a duty of care to (Bestari). If BBMB had followed the directions drawn up by BBMB to safeguard the interest of the bank and clients like (Bestari), the account would not have been opened.

Under the circumstances, there is without a doubt that BBMB was negligent.

…

[35] The claim against BBMB is also premised on negligence. It is trite law that to succeed, it behoves the plaintiff to prove the following:

(a) existence of a duty to the plaintiff;

(b) the defendant had breached that duty; and

(c) loss suffered was foreseeable.

[36] The case for Bestari is that BBMB employed less than active banking procedures in

(a) failing to verify the application to open the account 010013066091 on 24 October 1995; and that

(b) its servants, En Zabidi Mohamed Akib and En Rusli Dollah, for whose acts it is vicariously liable, failing to verify that directors of Bestari had signed the forms to open the account before giving approval.

[37] The reason forgers can succeed to open bogus accounts in the name of various companies is because, as per the evidence of En Zabidi Mohamed Akib (D2W1), it is not normal practice for the bank to obtain confirmation from the company when someone makes an application purporting to be for a company. While it may seem trite wisdom that such scams could be avoided by verifying with the company, the answer may be found as follows:

(a) Who do you ask for the contact of the company? The person who made the application.

(b) What is the probability that the person purporting to represent the company is a fraudster? It does not happen all the time.

(c) What is the probability that a representative of a company would defraud the company? It does not happen all the time.

[38] In other words, even if the person purporting to represent the company is a fraudster or not, he would have made sure the contact number he gives is to a person who will confirm the application is genuine. Companies make applications through a human representative. There is no basis to take judicial notice that fraud is so endemic in banking account applications that prudent business practice requires every application to be verified. It would slow down business as time and cost is consumed to check and verify. Of course when an application is found to be fraudulent subsequently, the man in the street may say the bank was negligent in not making verification. But that is wisdom after the event. In law, the material time to be taken into consideration is the time the application was made. Taking it in context the failure to verify is at worst an error of judgment.

[39] Likewise, a forger would ensure the signatures are as perfect as possible, while everyone is aware signatures do vary with time of day, whether one is standing or sitting and even one's state of mind when making the signature.

[40] In our view, too much weight was put on the failure to verify even with the imperfections in the signatures, and not enough weight was given to the fact and evidence before the court that:

(a) it was pleaded that Zauwiah was appointed to represent Bestari;

(b) the cheque was paid into the Bestari account that is now purported to be without knowledge or authority of PW1 and PW2 on 28 October 1995 and the money withdrawn two days later, she was, as pleaded, at all times

a shareholder of Bestari and the evidence shows share transfers dated 10 October 1995 of 70% of the shares of Bestari to Zauwiah;

(c) PW1 admitted he was told by Zauwiah at the end of 1995 payment was made to MFB because the loan sum had been released, when he knew that he had not complied with the conditions precedent;

(d) upon the purported discovery of the fraud by Zauwiah, neither Bestari nor PW1 or PW2 made any police report or informed MFB and BBMB, but entered into a share sale agreement with Zauwiah under which she would buy over all of the shares in Bestari, contradicting the share transfers of 10 October 1995;

(e) PW1 and PW2 remained as directors until the end of 1996.

(f) Police reports were lodged in 1997 only after notices of demand were issued in 1997 by MFB's solicitors.

[41] If all these were taken into consideration and given the proper weight, it shows that in all the circumstances Bestari was the author of its own misfortune, and even if it were not wholly responsible, it had effectively accepted the conduct of Zauwiah. Its failure to act promptly upon purported discovery in all probability made impossible and therefore denied opportunity to both MFB and BBMB to minimise losses. A party cannot approbate and reprobate, and still seek recovery for itself, as is the case here when Bestari and its guarantors proceed to sue MFB and BBMB in 1998.

[42] We conclude that the learned judge had erred and that the order of the High Court ought to be set aside.

[43] Accordingly, we allow the appeal with costs and set aside the order of the High Court against BBMB.

Appeal allowed with costs.

Reported by Afiq Mohamad Noor